$25,000.00 per acre for the portion of 10.54 acres from Lot 614. In addition he awarded 5% for injurious affection under section 60(1)(c) of the Land Code in respect of Lot 614. This came to $13,175.00. The total amount is $340,875.00. He ordered each party to pay his own costs.

Appellants contended that the learned Judge erred in law when he related his award of an additional 5% for damages for injurious affection to the value of the portion of Lot 614 acquired instead of to the value of the remaining portion of Lot 614. They maintained that the two assessors in fact awarded the 5% depreciation on the value of the remaining portion of Lot 614. There is no merit in this ground.

Where a claim is made involving diminution in value it is essential to have two valuations relating to the appellants' other land, namely, one the market value immediately prior to acquisition of the land and the other immediately after acquisition. The difference between the two valuations may be taken as representing the extent of the injurious affection relating to diminution in value of the remaining land. The appellants' valuer did so before the learned Judge. He put the market value for the remaining land at $30,000.00 per acre based on the valuation of the land acquired. He assessed the land acquired at $36,000.00 per acre but gave allowances for irregular size, access, title conditions and so forth in quantifying the value for the remaining land prior to acquisition. On this point the learned Judge observed at page 146 of the Appeal Record Part I as follows:–

"Now, since the basis of valuing the 10.54 acres of Lot 614 which had been acquired at $36,000.00 an acre, had been rejected by the court, it seems to follow that the valuation of the remaining area at $30,000.00 an acre would be untenable and could not be supported."

To be fair it should be pointed out that before the Superintendent the appellants' valuer did not specify the amount for severance and injurious affection. He could not expect the Superintendent just to pluck a figure out of the air in making his award. He specified the sum of $688,300.00 based on a depreciation of $30,000.00 to $20,000.00 per acre – a difference of $10,000.00 when requesting the Superintendent to refer the case to the High Court. This sum was later amended to $1,720,750.00. Claims relating to severance and injurious affection are often difficult to substantiate. In the present case it is even more so on the particular facts. To succeed a valuer must quantify such damages realistically and convincingly. In determining a claim for injurious affection, a valuer should examine all the probable consequences of the acquisition in so far as they affect the owner's other land. Any damage sustained or likely to be sustained by the owners must be properly assessed. Quantification of damages should, as in the case of severance, be on a basis which can be supported by evidence. The learned Judge clearly rejected the valuation of the appellants' valuer. With respect, we think the learned Judge has exercised his discretion judicially and has not acted wrongly in principle in awarding $13,175.00 for injurious affection. We do not think an appellate court should interfere in the circumstances.

For reasons given we would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.*

S. MARIAPPAN v. GOVERNMENT OF MALAYSIA

[F.C. (Wan Suleiman, Abdul Hamid & Hashim Yeop A. Sani F.JJ.) May 25 & August 10, 1983]
[Kuala Lumpur – Federal Court Civil Appeal No. 108 of 1982]

Practice and Procedure – Appeal – Point of law not raised in Court below – Discretion of Court to allow point to be raised on appeal – Jurisdiction – Disciplinary powers – Whether Public Services Commission has powers – Public Services Disciplinary Board Regulations, 1972, regs. 3 & 17 – Federal Constitution, arts. 132 & 144.

Administrative Law – Disciplinary authority over members of public service – Public Services Commission or Disciplinary Board – Clerical and Technical group – Public Services Disciplinary Board Regulations 1972, regs. 3 and 17 – Federal Constitution, arts 132 & 144.

The appellant in this case had been dismissed from service by the Public Services Commission on the ground that he had failed to comply with a Treasury instruction which required daily collections exceeding $500.00 (for currency notes and coins) and $2,000.00 (for cheques and postal orders) in addition to cash to be deposited within a prescribed time in a local bank. On appeal it was argued for the first time that the Disciplinary authority for the purpose of the appellant was the Public Services Disciplinary Board and not the Public Services Commission and therefore the exercise of the power of dismissal by the Public Services Commission was wrong and the purported dismissal was void and of no effect.

Held: (1) in this case there was no question of fact that called for determination. The question was essentially one of jurisdiction. Therefore the court in the exercise of its discretion, considered it expedient in the interest of justice that the point pleaded should be allowed to be argued in the court for the first time;

(2) in this case as the appellant did not come under the subordinate and Manual Group but the Clerical and Technical Group, the Disciplinary Board had no authority to exercise disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment over the appellant. At the relevant time, such power was still vested in the Public Services Commission;

(3) The Public Services Commission had acted properly and within its jurisdiction when it exercised the disciplinary powers of dismissal over the appellant.

Cases referred to:

(1) *Innaya* v. *Lombard Acceptance (M) Ltd.* [1963] M.L.J. 30.
(2) *United Marketing Co.* v. *Hasham Kara* [1963] M.L.J. 261.
(3) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233, P.C.
(4) *Tan Tek Yan* v. *Samuel* [1964] M.L.J. 283, F.C.
(5) *Lim Chui Lai* v. *Zeno Limited* [1964] M.L.J. 314, F.C.
(6) *The 'Tasmania'* (1890) 15 A.C. 223.
(7) *Gulwant Singh* v. *Abdul Khalik* [1965] 2 M.L.J. 55, P.C.
(8) *Connecticut Fire Insurance* v. *Kavanagh* [1892] A.C. 473, 480.
(9) *Ang Hua Bee* v. *Leong Miaw Yu* [1969] 1 M.L.J. 192.

FEDERAL COURT.

Karpal Singh (*K. Vijayamoorthy* with him) for the appellant.

P.M. Mahalingam (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appellant S. Mariappan employed in the permanent pensionable service of the Government of Malaysia as a clerical officer attached to Telecoms Department was dismissed from service by the Public Services Commission (P.S.C.) on August 7, 1972 on the ground that he failed to comply with Treasury Instruction 78(a) which requires daily collection exceeding $500/- (for currency notes and coins) and $2,000/- (for cheques and postal orders) in addition to cash, to be deposited within a prescribed time in a local bank. The P.S.C. found as a fact that this failure to comply was in regard to a sum of $5,076.63 from a total collection of $16,998.04 for period between September 27, 1969 to January 2, 1970.

These facts are not challenged before us on appeal. The sole ground raised upon which the appellant relies revolves on a point of law not raised in the lower Court as follows–

"3. The Learned Trial Judge should have held *that the Disciplinary Authority for the purpose of the appellant category was the Public Services Disciplinary Board* and not the Public Services Commission and should have held that the exercise of power of dismissal by the Public Services Commission was wrong and that the purported dismissal was therefore void and of no effect."

Mr. Karpal Singh counsel for the appellant has urged the court to exercise its discretion to allow this point not raised before to be argued as it is vital to the appellant's case.

The principles on which the Court of Appeal will permit a point of law not raised in the Court below to be raised on appeal can be found in a number of authorities. As a starting point we refer to a passage in *Mallal's* Supreme Court Practice at page 917 under the heading "Points not taken in Court below." The principle that emerges from the authorities, fundamentally, is that the Court of Appeal will not consider an issue which has not been raised before, particularly on a point not argued in the court below and which did not appear specifically in the pleadings. The propriety of allowing such point to be raised is also doubted where it is highly technical and devoid of merit. Cases decided after 1962 confirm that a ground of appeal not pleaded in the lower court is not open to the appellant *(Innaya* v. *Lombard Acceptance (M) Ltd.).*[1] In the Privy Council case of *United Marketing Co.* v. *Hasham Kara*[2] it is stated that a point not taken in the lower court will not be allowed to be argued unless it is satisfied that the evidence on which it is asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. It is also stated that even if the facts are beyond dispute they would not readily allow a fresh point of law to be argued without the benefit of the judgment of the Judges in the court below. (See also *Rengasamy Pillai* v. *Comptroller of Income Tax).*[3]

A further authority on the principle followed by an appellate court in dealing with a point not taken at the trial may be found in *Tan Tek Yan* v. *Samuel*[4] where it is held that a point, not taken at the trial, and presented for the first time in the appellate court ought to be most jealously scrutinised and an appellate court ought only to decide in favour of the appellant on a ground there

put forward for the first time, if it be satisfied beyond any doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial. (See also *Lim Chui Lai* v. *Zeno Limited).*[5] (See also *The "Tasmania"*).[6]

In *Gulwant Singh* v. *Abdul Khalik*[7] Thomson L.P. delivering the judgment of the court referred to *The "Tasmania"* and went on to say that "The question of whether effect should be given to a point not raised at the trial and which is raised for the first time in the appellate Court is one for discretion and the principles on which that discretion will be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance* v. *Kavanagh*[8] as follows –

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea."

In another case *Ang Hua Bee* v. *Leong Miaw Yu,*[9] also on a similar point, it was laid down that although as a general rule a point not raised in the court below cannot be considered on appeal but in cases relating to jurisidiction of the court to order possession, the fact that the point was not taken in the court below does not preclude the tenant from relying on it.

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provisions of the Constitution and Service Regulations. There is no question of fact that calls for determination. On the evidence disclosed the appellant's contention rests solely on whether the proper body vested by law to exercise disciplinary authority over the appellant was the Public Services Disciplinary Board or the Public Services Commission. The question is, therefore, essentially one of jurisdiction. If we should hold in favour of the appellant, it would necessarily mean the Public Service Commission had acted *ultra vires* and the validity and effect of the dismissal would accordingly be open to question. We therefore feel that in exercise of our discretion, indeed we consider it expedient in the interests of justice, that this point, although not taken in the court below and not pleaded, should be allowed to be argued in this court.

It is submitted by the appellant that at the time when he was asked to show cause (January 1, 1972) (appendix C p. 15 of Part III of the Record), the disciplinary authority was not the P.S.C. but the Disciplinary Board constituted under the Disciplinary Board Regulations, 1972, P.U.(A) 48, (we call the Regulations), effective from January 1, 1972. It is also submitted that by virtue of Article 144 (5B)(i) and (iv) the power to take disciplinary action against him was vested in that Board pursuant to regulations 3(1) and (2) of the Regulations.

For ease of reference we have set out hereunder Article 144(5B)(i) and (iv) of the Federal Constitution and also Regulation 3 of the Public Services Disciplinary Board Regulations, 1972 –

"(5B)(i) Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first appointment to the permanent or pensionable establishment, may be exercised by a board appointed by the Yang di-Pertuan Agong.

(iv) Where the Yang di-Pertuan Agong has appointed the Board under paragraph (i) of this Clause for the purpose of exercising any of the powers or functions referred to under that paragraph, such power or functions to be exercised by the Board, shall cease to be exercisable by the said Commission."

"3. (1) Subject to paragraph (2) the Board shall have jurisdiction and shall exercise its functions in matters relating to discipline over all persons who are members of the services mentioned in paragraphs (c) and (f) of Clause (1) of Article 132 of the Federal Constitution as specified in the First Schedule except in respect of those officers officiating or acting in the posts of the Chief Secretary to the Government and the Director General, Public Services.

(2) No Board other than the Board which has jurisdiction over the subordinate staff in the Subordinate and Manual Group shall exercise the disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment."

It is further submitted that as at that date January 11, 1972 the Public Services Commission ceased to be the disciplinary authority. Mr. Karpal Singh refers to regulation 17 which he submits supports his contention. Regulation 17, saving and transitional provision, provides that –

"(1) Nothing in these Regulations shall affect any act done or proceedings commenced by the Public Services Commission before the commencement of the Regulations repealed by regulation 16 or by the Disciplinary Board before the commencement of these Regulations: and all such acts and proceedings shall be deemed to have been done or commenced by the Board or an Appeal Board as if these Regulations had been in force.

(2) Nothing in these Regulations shall be deemed to affect or take away any of the powers, privileges or protection conferred upon or accorded to the Public Services Commission or any member thereof under the Services Commissions Ordinance, 1957."

It is the appellant's contention that the operative words there are the words "procedings commenced", and in so far as they relate to him proceedings commenced with the show-cause letter that was sent to him on January 11, 1972. Since it was commenced by the P.S.C. after the coming into force of the Regulations, regulation 17 cannot therefore be invoked to save the power of the P.S.C. and on that ground alone, this appeal should be allowed. Reference is made to Regulation 17(3) but we do not see how it could support the appellant's contention. On the contrary it supports the respondent's case covering the re-classification under Pekeliling Perkhidmatan Bil. 7 Tahun 1970. We will come to that shortly. Again for ease of reference we reproduce Regulation 17(3) which reads –

"(3) Any disciplinary proceedings in respect of an officer commenced by a Disciplinary Board before the commencement of these Regulations may be disposed of by that Disciplinary Board notwithstanding the re-classification of such officer under the Pekeliling Perkhidmatan Bil. 7 Tahun 1970 or Pekeliling Perkhidmatan Bil. 10 Tahun 1971 and the provision of regulation 2 or 3 as the case may require, and the Disciplinary Board shall have all the powers of the Board constituted under these Regulations."

Now, Mr. Mahalingam, Senior Federal Counsel appearing on behalf of the Government of Malaysia submits that the appellant belonged to Group C – Clerical and Technical – in the general public service of the Federation covered by Article 132(1)(c) of the Federal Constitution. He also submits that this group does not come under the category of the subordinate staff in the subordinate and manual group. We agree. Para 20 of Service Circular No. 7 of 1970 which deals with the classification of officers abolished the classification system and substituted therefor groups A, B and C based on the maximum salary in a salary scale effective from January 1, 1970 and the appellant was placed under Group C – Kumpulan Pekeranian dan Teknik (Clerical and Technical Group).

The question now before us is whether the P.S.C. ceased to have disciplinary authority over the appellant upon the establishment of the Disciplinary Boards under regulation 2 of the Regulations whose members were specified in the First Schedule. The answer to the question is, in our view, to be found in regulation 3(2). While regulation 3(1) provides that the Board shall have jurisdiction and shall exercise its functions in matters relating to discipline over all persons who are members of the services mentioned in paragraphs (c) and (f) of Clause (1) of Article 132 of the Federal Constitution as specified in the First Schedule, it is however made subject to regulation 3(2) which directs that no Board shall exercise the disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment *except the Board which has jurisdiction over the subordinate staff in the Subordinate and Manual Group.* (The emphasis is ours). As the appellant did not come under the Subordinate and Manual Group but the Clerical and Technical Group, the Board that was established to have jurisdiction and to exercise functions over persons referred to earlier (reg. 3(1)), (the appellant included) was not therefore by law vested with the necessary authority to exercise disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment over the appellant. At the relevant time such power was still vested with the P.S.C.

For reasons stated, it is our view that the P.S.C. had acted properly and within its jurisdiction when it exercised the disciplinary powers of dismissal over the appellant. Accordingly we dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Adnan Sundra & Low.*